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IN THE
SUPREME COURT OF THE UNITED STATES

No. 06-A 150

STATE OF SOUTH CAROLINA,
Applicant,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Motion for Leave To File Complaint

APPLICATION OF THE STATE OF SOUTH CAROLINA FOR A PRELIMINARY INJUNCTION

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Pursuant to 28 U.S.C. § 1251(a) and Rule 22 of the Rules of this Court, the State of South Carolina, by its Attorney General, Henry Dargan McMaster, respectfully requests the issuance of a preliminary injunction to preserve the status quo pending resolution of the related original action filed by the State of South Carolina contemporaneously with this application, by prohibiting North Carolina from authorizing transfers of water from the Catawba River in excess of those authorized as of the date of this application.

Background

As set forth in greater detail in its Complaint and its brief in support of its motion for leave to file that complaint, in 1991 North Carolina enacted an "interbasin transfer statute" pursuant to which it has authorized the transfer of at least 48 million gallons of water per day from the Catawba River Basin to basins of other rivers in North Carolina. The most recent such transfer was authorized in January 2007. In addition, there is at

least one pending application — by Union County — that seeks authority to transfer an additional 13 million gallons of water per day from the Catawba River.[1] The transfers that North Carolina has authorized to date already exceed its equitable share of the Catawba River and have directly harmed South Carolina and its citizens by severely reducing the flow of water into South Carolina that is available for the generation of hydroelectric power, economic development and commerce, and recreation.

The Catawba River is subject to "severe periodic fluctuations in water level," "inadequate water volume at ordinary stages,"[2] and severe droughts. *See* App. 14-21.[3] Indeed, both North Carolina and South Carolina have issued drought advisory warnings for the Catawba River Basin, with both States currently declaring that moderate drought conditions exist.[4] During the most recent prior drought, which lasted from 1998 through 2002, major boat landings and public access areas were closed due to the low water levels, harming both the public and the businesses that run the marinas. *See* App. 23, 38. Tap water was undrinkable in the City of Camden, South Carolina. *See* App. 38. Duke Energy was forced to reduce dramatically the generation of electricity from its hydroelectric

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[1] In 1989, the South Carolina Water Resources Commission had, pursuant to South Carolina Code Annotated §§ 49-21-10 *et seq.*, authorized both Lancaster County, South Carolina, and Union County, North Carolina — which jointly own a water treatment plant located in South Carolina on Lake Wylie, from which both counties derive their water supply — to transfer a maximum of 20 million gallons of water per day from the Catawba River. That permit, however, requires both counties to decrease or cease their withdrawal from the Catawba River, when necessary to maintain a sufficient flow of water downstream of Lake Wylie. *See* Class I Interbasin Transfer Permit, No. 29 WS01 S02 (May 8, 1989).

[2] *Jones v. Duke Power Co.*, 501 F. Supp. 713, 717 (W.D.N.C. 1980), *aff'd*, 672 F.2d 910 (4th Cir. 1981) (table).

[3] References to "App." are to the Appendix that is bound together with the motion for leave to file a complaint, the complaint, and the brief in support of that motion, which are being filed contemporaneously with this application.

[4] *See* North Carolina Drought Management Advisory Council, http://www.ncdrought.org (visited June 6, 2007); South Carolina State Climatology Office, http://www.dnr.sc.gov/climate/sco/Drought/drought_current_info.php.

stations located on the Catawba River. *See id.* And businesses, such as the Bowater pulp and paper mill, were forced to incur significant costs — more than $6,000 per day — because the water flow was no longer sufficient to assimilate treated wastewater in amounts allowed by state permits. *See* App. 32-33, 38-39. Indeed, the flow in major tributaries of the Catawba River was so reduced that the only water flowing was the discharge from wastewater treatment plants. *See* App. 39.

By authorizing the transfer of tens of millions of gallons of water on a daily basis from the Catawba River into other rivers, North Carolina's actions have exacerbated the already fragile state of the Catawba River and reduced further the often limited flow of water into South Carolina. Because efforts to reach a negotiated resolution of this dispute have been unsuccessful, South Carolina has filed a motion for leave to file a complaint seeking an equitable apportionment of the Catawba River and a permanent injunction preventing North Carolina from authorizing transfers in excess of its equitable share. To prevent further harm to South Carolina during the pendency of this action, South Carolina files this application for a preliminary injunction to prevent North Carolina from approving further transfers of water out of the Catawba River prior to this Court's equitable apportionment of the River.

Discussion

Courts traditionally consider four factors in determining whether to issue a preliminary injunction: "probability of success on the merits," "the risk of irreparable harm, the balance of the equities, and the public interest." *E.g., Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 670 (2003).

This Court has also granted a preliminary injunction in at least one original action. *See Pennsylvania v. West Virginia*, 39 S. Ct. 491 (1919) (mem.).[5] In that case, Pennsylvania and Ohio filed bills of complaint challenging a West Virginia statute that compelled all pipeline companies producing or transporting natural gas in West Virginia to satisfy the demand of West Virginians and permitted "surplus gas only to be carried into other states." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593-94 (1923). The statute would thus necessarily have resulted in "cutting down [the natural gas] carr[ied] into Pennsylvania and Ohio." *Id.* at 589. To prevent that reduction from occurring pending this Court's adjudication of the dispute, "[i]nterlocutory injunctions were prayed and granted at the outset and [we]re still in force" at the time the Court ruled, in that case, four years later. *Id.* at 590.

South Carolina seeks the same preliminary relief in this case, to prevent North Carolina from approving the transfer of more water from the Catawba River during the pendency of this dispute, thereby further reducing the volume of water flowing into South Carolina and inflicting additional harm on South Carolina, above and beyond the harm caused by North Carolina's past approval of such transfers. Indeed, each of the four factors is readily met in this case.

First, South Carolina has shown a probability of success on the merits. North Carolina's interbasin transfer regime is premised on the proposition that "a state rightfully may divert and use, as she may choose the waters flowing within her boundaries in [an] interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary," which this Court long ago rejected. *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922). Instead, "States have an affirmative duty under the doctrine of

[5] In *Texas v. Louisiana*, 414 U.S. 904 (1973) (mem.), this Court referred a motion for a preliminary injunction to the Special Master.

equitable apportionment to take reasonable steps to conserve and even to augment the natural resources within their borders for the benefit of other States." *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983). North Carolina's statute plainly violates that duty.

Moreover, because there are already times when the Catawba River does not have enough water to meet South Carolina's existing needs, *see* App. 14, there can be little doubt that North Carolina has already taken at least, if not more than, its entire equitable share of the Catawba River. *See, e.g., Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945) (holding that equitable apportionment is warranted where, as here, "the claims to the water of a river exceed the supply"). Additional transfers of water from the Catawba River, beyond the 48 million gallons per day that North Carolina has already authorized, are highly likely to be found preempted as granting rights in excess of North Carolina's equitable share. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 108-10 (1938) (holding that a State "possesse[s] the right only to an equitable share of the water in" the river and cannot "award to [its citizens] any right greater than the equitable share").

Second, South Carolina has shown that further transfers would cause it irreparable injury. Additional transfers will necessarily further reduce the water flowing in the Catawba River into South Carolina and available for the generation of hydroelectric power, economic development and commerce, and recreation. The environmental and recreational harms alone that further transfers would cause constitute irreparable injury. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable."); *see also* App. 38, 39 (detailing the environmental and recreational harms incurred during the 1998-2002 drought). In addition, as this Court has recognized in analogous circumstances, "any diversion by [North

Carolina], unless offset by [South Carolina] at its own expense, will necessarily reduce the amount of water available to [South Carolina] users" in the Catawba River Basin. *Colorado v. New Mexico*, 459 U.S. 176, 188 n.13 (1982); *see also* App. 38-39 (detailing the monetary costs incurred by South Carolina residents and businesses during the 1998-2002 drought). South Carolina's citizens, however, will have no ability to recover those costs, rendering that economic harm irreparable as well.

Finally, the balance of equities tips decidedly in South Carolina's favor. Because North Carolina lacks authority to "award to [its citizens] any right greater than the equitable share," *Hinderlider*, 304 U.S. at 108, North Carolina and its citizens cannot be harmed by the prevention of future transfers, which would go well beyond North Carolina's equitable share. In addition, because the injunction would preserve the status quo, North Carolina and its citizens will be able to continue their current uses of the Catawba River, despite South Carolina's claims that North Carolina is already in excess of its equitable share. Moreover, North Carolina would remain free to reallocate current uses of the Catawba River to meet local needs, so long as it did not increase the total amount of water transferred from the Catawba River. The public interest likewise favors the preliminary injunction, because the harms imposed on South Carolina from further transfers far outweigh any harms to North Carolina from the injunction.

Conclusion

For the foregoing reasons, South Carolina respectfully requests the issuance of a preliminary injunction enjoining North Carolina from authorizing transfers of water from the Catawba River in excess of those authorized as of the date of this application, thereby preserving the status quo pending resolution of the related original action filed by the State of South Carolina contemporaneously with this application.

Respectfully submitted,



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No. ___, Original & No. 06-A____

STATE OF SOUTH CAROLINA,
Plaintiff / Applicant,

v.

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CERTIFICATE OF SERVICE

Pursuant to Rule 29.5 of the Rules of this Court, I certify that all parties required to be served have been served. On June 7, 2007, I caused (1) three copies of the Motion of the State of South Carolina for Leave To File Complaint, Complaint, and Brief in Support of Its Motion for Leave To File Complaint (with Appendix), and (2) one copy of the Application of the State of South Carolina for a Preliminary Injunction to be served by overnight courier delivery on the following:

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